

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

BRIAN ZAHN,  
Plaintiff,

v.

DR. FRANCIS HARVEY, Acting  
Secretary, Department of  
Army,

Defendant.

NO. CV-03-0356-EFS

**FINDINGS OF FACT AND CONCLUSIONS  
OF LAW**

A bench trial was held in the above-captioned matter on October 27 and 28, 2008. Plaintiff Brian Zahn proceeded pro se; Assistant United States Attorney Andrew Biviano represented Defendant Dr. Francis Harvey, Acting Secretary of the Department of the Army. Mr. Zahn testified and also called four witnesses (Melanie Johanns, Jessica Jones, Dr. Glen Frese, and John Skibby) to support his Title VII, Americans with Disabilities Act (ADA), Rehabilitation Act (RA), and Washington Law Against Discrimination (WLAD) retaliation claims. Following Mr. Zahn's case, Defendant elected not to call witnesses. The Court took the matter under advisement and, after considering the legal standards and evidence presented, concludes that Mr. Zahn failed to carry his burden to prove these claims by a preponderance of the evidence. Accordingly, based on the Findings of Fact and Conclusions of Law set out hereafter, the Court finds for Defendant.

**FINDINGS OF FACT**

**A. Undisputed Facts**

1. This Court is vested with jurisdiction.

2. Mr. Zahn was at all times material hereto a resident of Douglas County, State of Washington, which is within the Eastern District of Washington.

3. For approximately twenty (20) years, Mr. Zahn worked as an electronic system control crafts worker at the Chief Joseph Dam Project ("the Dam"), operated by the United States Army Corps of Engineers ("Corps").

**B. Facts Found by the Court**

1. Mr. Zahn was one (1) of three (3) electronic system control crafts workers at the Dam along with eighteen (18) operators under the supervision of John Skibby, Chief of Operations at the Dam. With the exception of a few days at the beginning of January 2001 and for a grievance hearing in February 2001, Mr. Zahn did not work at the Dam from June 21, 2000, to October 2001, when he began his retirement. During that period, Mr. Zahn was either on leave without pay, sick leave, or annual leave. Mr. Zahn applied for early retirement in May 2001.

2. Mr. Zahn filed workplace grievances and EEOC complaints in 2000, which are protected activities. While one or more of those complaints were on file, he was granted leave under the Family Medical Leave Act (FMLA) and met with Ed Reynolds, the Dam's Operations Project Manager, regarding his return to work. Mr. Zahn was permitted to return to work, albeit only for a few days in early 2001.

1           3.     Following a telephone conference with the Corps' Seattle  
2 headquarters on January 5, 2001, during which there was some discussion  
3 regarding the potential for workplace violence by Mr. Zahn, Mr. Reynolds  
4 sent Mr. Zahn both an e-mail and a certified letter instructing him not  
5 to return to work and denying him access to the Dam based on the medical  
6 letters Mr. Zahn submitted when he returned to work. There is no  
7 evidence that anyone participating in the decision to issue this  
8 instruction was motivated by discriminatory bias or retaliatory animus  
9 relating to Mr. Zahn's EEOC complaints and workplace grievances.

10           4.     Mr. Skibby credibly described Mr. Zahn as an extremely  
11 intelligent man whom he had favorably evaluated as late as February 2000  
12 as important to the Dam's operations. Mr. Skibby favored Mr. Zahn's  
13 return to work at the Dam because he was needed. Mr. Skibby did not  
14 deny any of Mr. Zahn's leave requests and properly forwarded Mr. Zahn's  
15 August 2000 FMLA request. That this request was not acted on until  
16 October 2000 was not due to any bias or retaliation by Mr. Skibby. Mr.  
17 Zahn did not prove that Mr. Skibby acted out of discriminatory animus or  
18 in retaliation for Mr. Zahn's EEOC complaints and workplace grievances.  
19 Mr. Skibby's evident irritation with the necessity for extra work  
20 associated with responding to Mr. Zahn's complaints and requests to  
21 return to work is understandable given his weighty duties as Chief of  
22 Operations. Nothing in Mr. Skibby's demeanor while testifying supported  
23 any discriminatory bias or retaliatory attitude towards Mr. Zahn. The  
24 decision to decline Mr. Zahn's request for an accommodation to allow  
25 telecommuting was neither unreasonable nor animated by discrimination or  
26 retaliation; rather, the Dam's control system precluded outside access  
27

1 to its computer system and Mr. Zahn's duties required his presence at  
2 the Dam powerhouse. Further, there was no evidence that Mr. Skibby had  
3 any impact on the Corps decision, which was largely driven by Seattle  
4 headquarters, to issue the letter directing Mr. Zahn not to return to  
5 work. This letter ("the instruction") was prepared and sent by Ed  
6 Reynolds. There is also no evidence that Mr. Skibby opposed Mr.  
7 Reynolds' later effort to mediate with Dr. Frese and Mr. Zahn on a  
8 return to work.

9       5. The only evidence of Mr. Reynolds' conduct was contained in  
10 the exhibits admitted and testimony about him because neither party took  
11 his deposition and Mr. Zahn's effort to subpoena him for trial failed.  
12 Neither the admitted exhibits nor the trial testimony demonstrated any  
13 discriminatory bias or retaliation by Mr. Reynolds. In fact, Mr.  
14 Reynolds' behavior, as reflected in the trial testimony and admitted  
15 exhibits, including Plaintiff's Exhibit No. 104-12 - a notation  
16 memorializing a financial award by Mr. Reynolds to Mr. Zahn for his work  
17 efforts - , demonstrated a sincere respect for Mr. Zahn and a genuine  
18 interest to find a solution enabling Mr. Zahn to return to work. This  
19 is most clearly demonstrated by his decision in the spring of 2001 to  
20 retain Dr. Frese, one of Mr. Zahn's treating care providers, to mediate  
21 with him and Mr. Zahn on returning to work.

22       6. Mr. Zahn was well prepared at trial. He exhibited  
23 intelligence, diligence, and familiarity with the rules of evidence and  
24 procedure. He made appropriate objections and cogent legal arguments  
25 throughout the trial, including a motion for a directed verdict as a  
26 matter of law.

1           7. The instruction not to return to work, together with the  
2 necessary dissemination of that instruction to appropriate personnel at  
3 the workplace, spawned rumors. Mr. Zahn was emotionally impacted by  
4 both the instruction and the rumors. As a long-time Dam employee, his  
5 work became a part of how he saw himself, a part of his self worth. It  
6 has been said, "we are what we do." It follows that the longer a person  
7 does a job, the more the person becomes it or the more it becomes a part  
8 of the person's self image and value. When a person is no longer  
9 permitted to do that job, particularly involuntarily, the impact on self  
10 image and psyche can be very damaging. Americans are workers - often  
11 said to be the most productive in the world. Putting pundits aside,  
12 American workers take pride in their work. There is also a dignity in  
13 work, particularly of the kind done by Mr. Zahn and the others at the  
14 Dam - a project of enormous importance to the Northwest - which is lost  
15 when that work is terminated. In a perfect world, perhaps the situation  
16 here could have been resolved without the instruction not to return to  
17 work, but perfection is not required. All that is required is that such  
18 an instruction not be issued because of discriminatory bias or in  
19 retaliation for protected activity. Here, there is no proof by a  
20 preponderance of the evidence that it was.

#### 21                           **CONCLUSIONS OF LAW**

22           While the Court empathizes with Mr. Zahn and respects his  
23 intelligent and diligent presentation of his case, the Court concludes  
24 as a matter of law that Mr. Zahn did not prove by a preponderance of the  
25 evidence that Defendant violated Title VII, the ADA, the RA, or the  
26 WLAD.

1 **A. Title VII**

2 Title VII, 42 U.S.C. § 2000e et seq., prohibits employment  
3 discrimination, including retaliation. In order to prove a Title VII  
4 retaliation claim, Mr. Zahn had the burden of proving by preponderance  
5 of the evidence that (1) he engaged in protected activity, (2) he  
6 suffered an adverse employment action, (3) the protected activity was a  
7 motivating factor in the adverse employment action, and (4) he suffered  
8 resulting damages. See *Steiner v. Showboat Operating Co.*, 25 F.3d 1459,  
9 1464 (9th Cir. 1994).

10 Mr. Zahn satisfied the first element by establishing that he filed  
11 workplace grievances relating to the distribution of overtime - a  
12 protected activity. 42 U.S.C. § 2000e-3(a). Mr. Zahn, however, failed  
13 to present evidence that he suffered an adverse employment action  
14 motivated by this protected activity. An adverse employment action is  
15 broadly defined as an employment action "reasonably likely to deter  
16 employees from engaging in protected activity." *Ray v. Henderson*, 217  
17 F.3d 1234, 1243 (9th Cir. 2000). Whether the protected activity was a  
18 motivating factor - a factor that "played a part in the employment  
19 decision" - may be inferred from proximity in time between activity and  
20 action. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989)  
21 (plurality opinion); *Ray*, 217 F.3d at 1234. If the employer would have  
22 made the same decision notwithstanding the employee's participation in  
23 the protected activity, then the employee will have failed to prove by  
24 a preponderance of the evidence that the protected activity was a  
25 motivating factor. *Stegall v. Citadel Broad Co.*, 350 F.3d 1061, 1067-68  
26 (9th Cir. 2004); *Costa v. Desert Place*, 299 F.3d 838, 857 (9th Cir.  
27 2002).

1 Mr. Zahn failed to establish by preponderance of the evidence that  
2 his workplace grievances played a part in the decision to issue the "do  
3 not report to work" instruction. The evidence established that the  
4 Corps would have so instructed Mr. Zahn notwithstanding his workplace  
5 grievances. Accordingly, Mr. Zahn's Title VII claim fails.

6 **B. ADA, RA, and WLAD**

7 Mr. Zahn also sought recovery under the ADA, RA, and WLAD for  
8 Defendant's alleged retaliatory conduct. The ADA provides, "No person  
9 shall discriminate against any individual because such individual has  
10 opposed any act or practice made unlawful by this chapter or because  
11 such individual made a charge, testified, assisted, or participated in  
12 any manner in an investigation, proceeding, or hearing under this  
13 chapter." 42 U.S.C. § 12203(a). Similarly, the RA states:

14 No otherwise qualified individual with a disability in the  
15 United States, as defined in § 704(20) of this title, shall,  
16 solely by reason of her or his disability, be excluded from  
17 participation in, be denied the benefits of, or be subjected  
18 to discrimination under any program or activity receiving  
Federal financial assistance or under any program or activity  
conducted by any Executive agency or by the United States  
Postal Service. . . .

19 29 U.S.C. § 794(d). The WLAD prohibits discrimination "against any  
20 person in compensation or in other terms or conditions of employment  
21 because of . . . the presence of any sensory, mental, or physical  
22 disability . . . ." RCW 49.60.180(3)

23 The Ninth Circuit has recognized that the Title VII retaliation  
24 analytical framework is also used for the ADA, the RA, and the WLAD.  
25 *Barnett v. U.S. Airlines, Inc.*, 228 F.3d 1105, 1121 (9th Cir. 2000)  
26 (adopting Title VII analysis for the ADA); *Coons v. Sec'y of U.S. Dep't*  
27 *of Treasury*, 383 F.3d 879 (9th Cir. 2004) (adopting ADA analysis for the

1 RA); *Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1065 (9th Cir. 2003)  
2 (utilizing Title VII analysis for WLAD). Because Title VII standards  
3 apply to ADA, RA, and WLAD retaliation claims, the Court likewise  
4 concludes that Mr. Zahn failed to carry his burden to prove by a  
5 preponderance of the evidence retaliation under the ADA, the RA, or the  
6 WLAD for requesting accommodation.

7 **CONCLUSION**

8 For the reasons given above, Mr. Zahn failed to establish by a  
9 preponderance of the evidence a violation of Title VII, the ADA, the RA,  
10 or the WLAD. Accordingly, **IT IS ORDERED:**

11 1. **Judgment** shall be entered in Defendant's favor with prejudice.

12 2. The remainder of Mr. Zahn's Objections to Witness/Exhibit List  
13 and Motions in Limine (**Ct. Rec. 190**) are **DENIED AS MOOT**. The Court's  
14 admissibility rulings are reflected on the record.

15 3. This file shall be **CLOSED**.

16 **IT IS SO ORDERED**. The District Court Executive is directed to  
17 enter this Order, enter judgment in favor of Defendant and furnish  
18 copies to Mr. Zahn and counsel.

19 **DATED** this 31<sup>st</sup> day of December 2008.

20  
21 s/Edward F. Shea  
22 EDWARD F. SHEA  
23 UNITED STATES DISTRICT JUDGE

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